

STATE OF MICHIGAN
COURT OF APPEALS

SHAHID A. MUHAMMED,

Plaintiff-Appellant,

v

NADIRAH Q. MUHAMMED,

Defendant-Appellee.

UNPUBLISHED

June 2, 2009

No. 288012

Washtenaw Circuit Court

LC No. 04-000330-DM

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

MEMORANDUM.

Plaintiff father appeals as of right the trial court's order modifying his custodial status and denying his motion for a change of custody. We remand to the trial court for clarification of its order and further proceedings consistent with this opinion.

Plaintiff father moved the trial court to change a custody order entered in January 2004 with respect to the parties' four minor children. The order provided for joint legal and physical custody with primary physical custody in defendant. Plaintiff father alleged that changed circumstances warranted a modification of the order. The trial court referred the matter to a Friend of the Court (FOC) evaluator who agreed that there were changed circumstances given the breakdown in the parties' initial agreement to co-parent and issued a report recommending that defendant not only retain primary physical custody, but that she be awarded full legal custody. The FOC report also recommended an increase in child support as the children were residing almost exclusively with their mother.

Plaintiff father objected to the FOC report, while defendant mother moved to adopt the FOC recommendation. The trial court scheduled a hearing for both motions on the same day. Plaintiff indicated that he was "objecting to the entire [FOC] recommendation," and provided the trial court with a copy of his written objections. The trial court indicated that it would review plaintiff's written objections and "decide whether I think that warrants a hearing, at which time all of these other things will come up, or I may say sorry, I don't think you meet the threshold; I'm adopting the Friend of the Court recommendation."

Subsequently, the trial court issued a written order, which states in pertinent part:

1. The Defendant has failed to establish "proper cause shown" or a "change in circumstances" as required by MCL 722.271(1)(c).

2. Defendant has failed to establish that there are contested factual issues that must be resolved pursuant to MCL 3.210(C)(8).

IT IS HEREBY ORDERED:

The Friend of the Court Recommendation is ADOPTED as an order of this Court.

The Order as drafted is confusing. First, in what appears to be a scrivener's error, the moving party is referred to as "defendant" when in fact the moving party was plaintiff father. Of greater concern is the fact that the order indicates that the "proper cause" or "change of circumstances" requirement was not met (at least not by the moving party) but also adopts the FOC recommendation for a custody change, despite the fact that such a change cannot be ordered where neither of those requirements are met. MCL 722.27(1)(c); *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). Given the trial court's order for a change in custody granting full legal custody to the mother and making changes to child support, particularly in the presence of the above-mentioned scrivener's error, it appears likely that the trial court's intent was to find that there was "proper cause" or a "change in circumstance" meriting a reevaluation of the custody arrangements. However, this is not clear and accordingly, we will remand this to the trial court to clarify its order.

Additionally, even if the trial court's order clearly indicated a finding of proper cause or a change in circumstances, remand would be necessary. MCL 552.507(4) requires judicial review of FOC recommendations following the objection of a party by way of a de novo hearing. See *Dumm v Brodbeck*, 276 Mich App 460, 463-464; 740 NW2d 751 (2007). Here, plaintiff timely filed objections to the FOC recommendation and set forth multiple factual disputes. While MCR 3.210(8) provides for a determination without an evidentiary hearing where there is no factual dispute relevant to an informed decision, we believe that an evidentiary hearing is proper in this case.

Accordingly, we reverse the trial court's order changing custody and remand for the de novo hearing required pursuant to MCL 552.507. In light of our remand, we need not determine whether the trial court properly concluded that plaintiff did not show proper cause or a change in circumstances.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro